IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SALVATORE R. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND HIS SUCCESSORS IN OFFICE AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NASSAU INSURANCE COMPANY	:	**CIVIL ACTION**
vs.	:	
TIBER HOLDING CORPORATION	:	**NO. 95-5284**

M E M O R A N D U M

DUBOIS, J. **September 17, 1997**

Pending before this Court is the Motion of Defendant, Tiber Holding Corporation, to Dismiss the Amended Complaint Pursuant to Fed R.Civ.P. 12(b)(3) on the Ground of Forum Non Conveniens. Moreover, several choice of law issues have been raised and are fully briefed. For the reasons set forth below, defendant's Motion to Dismiss the Amended Complaint will be denied, New York law will be applied to plaintiff's veil-piercing and fraudulent conveyance claims, and the Court will defer its decision as to which law will be applied to plaintiff's breach of contract claim.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because the parties are of diverse citizenship and the amount in controversy exceeds $50,000, exclusive of interest and costs.[1]

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[1] This action was commenced before the jurisdictional limit in diversity actions was increased from $50,000 to $75,000. See 28 U.S.C. § 1332 (Historical and Statutory Notes) (increase in jurisdictional limit effective January 17, 1997).

I. BACKGROUND

Plaintiff, Edward J. Muhl, is the Superintendent of Insurance of the State of New York, acting in his role as Liquidator of Nassau Insurance Company ("Nassau"). Prior to June 22, 1984, Nassau was a New York stock casualty insurer principally engaged in writing New York medallion taxi policies and was wholly-owned by Venice Holding Corporation ("Venice"). Defendant, Tiber Holding Corporation ("Tiber" or "defendant"), was the majority owner of Venice. Tiber is a Delaware corporation and had its principal place of business in Jamaica, New York, Queens County, from 1979 to 1985. Since 1985 Tiber has had its principal place of business in Chester County, Pennsylvania. At all relevant times, Richard A. DiLoreto was Tiber's Chairman of the Board and Jeanne S. DiLoreto, Richard's wife, was its President and a director ("DiLoretos").

Camm Re Insurance Company ("Camm Re") was established as a Bermudian reinsurance company by the DiLoretos in 1976. Camm Re reinsured Nassau. In or about 1977, Camm Re was renamed Ardra Insurance Company, Ltd. ("Ardra"). Ardra's Bermuda license classified it as an "exempt" company, which means that it could only accept business from outside Bermuda and could not do business with Bermuda residents or businesses. Ardra was originally owned by Jeanne S. DiLoreto, who transferred ownership to SWM, Inc. ("SWM"), a Delaware corporation, in or about 1980. SWM merged into Tiber in December 1981.

Ardra's only business was the reinsurance of certain risks of

Nassau under several reinsurance treaties. Ardra was paid a portion of the policy premiums received by Nassau and agreed to pay a specified share of any losses on those policies. Nassau was placed in liquidation in New York by an Order dated June 22, 1984. Ardra ceased writing business at that time.

Plaintiff alleges that defendant engaged in a number of transactions between 1979 and 1981 that were designed to, and in fact did, divert to SWM/Tiber more than $10,000,000 of Ardra's assets. Furthermore, alleges plaintiff, in late 1982 and thereafter, defendant caused Ardra to complete transactions designed to hide the earlier diversions and create the illusion that Ardra was solvent.

In April of 1985, Salvatore R. Curiale, the then-Superintendent of Insurance for the State of New York, brought suit against Ardra and the DiLoretos, as Ardra's alter egos, in New York state court, claiming improper repudiation of the reinsurance treaties with Nassau and breach of its obligation to pay additional reinsurance proceeds to Nassau. The claim against the DiLoretos was severed and is currently pending in the Supreme Court of New York.

Ardra initially sought to compel arbitration in the New York action under the arbitration clauses contained in the reinsurance treaties. The Supreme Court of New York rejected that position by Order dated August 3, 1988 on the ground that the statutory scheme for liquidating insurance companies overrode the contractual provisions of the reinsurance treaties. That decision was upheld

by the New York Court of Appeals on December 20, 1990. Thereafter, Ardra filed an Answer, denying liability and setting out various defenses based on alleged breaches of its rights under the reinsurance treaties. However, on May 2, 1991, the New York Supreme Court, on Motion of plaintiff, ordered that Ardra's Answer be stricken unless Ardra posted security in the sum of $10,351,977.38 within thirty (30) days.[2] That decision was based on § 1213 of the New York Insurance Law which provides that before any unauthorized foreign or alien insurer (such as Ardra) files any pleading in any proceeding against it, it must either deposit with the Clerk of Court cash or securities or a bond in an amount fixed by the Court, sufficient to secure payment of any final judgment, or procure a license to do insurance business in the state. Ardra did not post the required bond and, accordingly, its Answer was stricken and a default judgment in the amount of $16,351,395.11 was entered against it in May of 1994 ("1994 Judgment"). On appeal, Ardra challenged the bond requirement as a violation of due process. That challenge was rejected, and the default judgment affirmed, by the Court of Appeals of New York. Curiale v. Ardra Insurance Co., Ltd., 88 N.Y.2d 268, 272, 667 N.E.2d 313, 315-16,

[2]Before a final decision on this issue was made by the New York Supreme Court, the Court gave Ardra an opportunity to negotiate the size of the bond it was required to post or to decide whether to obtain a license to do business in New York in order to avoid the bonding requirement. In response, Ardra reported that it would not seek a license to do business in New York and could only post $1,000,000 in security. The Supreme Court found $1,000,000 inadequate to secure payment of any future final judgment.

644 N.Y.S.2d 663, 665-666 (N.Y. 1996). Plaintiff contends that, with interest, the judgment currently exceeds $20,000,000.

In December 1990 Tiber sold Ardra to Corporate Holding Corporation ("Corporate Holding"). Corporate Holding is a Delaware corporation wholly owned by Richard DiLoreto and has no business other than its ownership of Ardra. Pursuant to the contract of sale, Tiber agreed, among other things, to maintain the capital and surplus account of Ardra at no less than $125,000 for five (5) years (until December 3, 1995).

In May of 1994, plaintiff commenced this lawsuit in New York state court, seeking to pierce Ardra's corporate veil and enforce against defendant the 1994 judgment. In June of 1994 defendant removed the case to the United States District Court for the Southern District of New York, where it was assigned to Judge Sotomayor. In August 1995, Judge Sotomayor denied defendant's Motion to Dismiss on the ground of forum non conveniens, but granted defendant's alternate Motion to Transfer and transferred the case to this Court. Curiale v. Tiber Holding Corp., No. 94 Civ. 4770(SS), 1995 WL 479474 (S.D.N.Y. Aug. 11, 1995).

Plaintiff filed an Amended Complaint on December 3, 1996. In the Amended Complaint plaintiff sets forth three claims. First, plaintiff seeks to pierce Ardra's corporate veil and enforce the 1994 judgment against defendant. Second, plaintiff asserts a breach of contract claim; he claims that pursuant to an order of

the Supreme Court of New York dated May 10, 1996[3] he is the Receiver of certain rights and assets of the judgment debtor, Ardra, and is, in that capacity, the third-party beneficiary of the contract by which defendant sold Ardra to Corporate Holding. As such, plaintiff alleges he is entitled to recover against defendant because Ardra's surplus was not maintained pursuant to the terms of the contract. Third, plaintiff asserts that certain transfers of assets from Ardra to Tiber were fraudulent conveyances.

While this case was pending, plaintiff instituted an action against Ardra in the Supreme Court of Bermuda (that country's trial court). In that lawsuit plaintiff sought to enforce the 1994 judgment. On May 16, 1997 the Bermuda court granted judgment in favor of Ardra, concluding that 1) enforcing the judgment would be contrary to public policy because plaintiff brought the New York action in violation of an order of the Supreme Court of Bermuda expressly prohibiting it from doing so and 2) the judgment could not be enforced because it was obtained in breach of "the English idea of substantial justice" (a concept similar to due process that is also known as natural justice).

Before the Bermuda decision was issued, defendant in the instant action filed a Motion Pursuant to Fed R.Civ.P. 12(b)(3) to Dismiss the Amended Complaint on the Ground of Forum Non Conveniens. In addition, a number of choice of law issues were raised and extensively briefed before the Bermuda decision was

[3] Although dated May 10, 1996, the Order was not entered by the Clerk of the Supreme Court until June 20, 1996.

rendered and additional briefs on the choice of law questions were submitted after the Bermuda decision. That Motion and the choice of law issues are addressed in this Memorandum.

II. DISCUSSION

A. Defendant's Motion to Dismiss on the Ground of Forum Non Conveniens

1. Positions of the Parties

Defendant contends that this case should be dismissed on the ground of forum non conveniens and that Bermuda is a more convenient forum. Plaintiff argues that the law of the case doctrine bars this Court's consideration of the Motion because defendant's prior Motion to Dismiss on the ground of forum non conveniens was denied by Judge Sotomayor. In response, defendant submits that the law of the case doctrine does not bar consideration of its Motion because Judge Sotomayor erred in her ruling and/or because changed circumstances justify dismissing the case. Plaintiff further argues that, in the event the Court rejects his law of the case argument, the Motion should be denied on its merits. The Court need not consider whether the law of the case doctrine bars defendant's Motion because the Court concludes that the Motion should be denied regardless of whether the law of the case doctrine compels that result.

2. Legal Framework

The Supreme Court has cautioned that "a plaintiff's choice of forum should rarely be disturbed." Piper Aircraft Co. v. Reyno,

454 U.S. 235, 241 (1981). However, notwithstanding a plaintiff's choice of forum, an action should be dismissed if an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would be so inconvenient to the defendant as to be out of all proportion to plaintiff's convenience, or if the chosen forum's own administrative and legal problems make that forum inappropriate. Id. (citing Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)). The decision as to whether to dismiss a case is left to the sound discretion of the district court, as guided by certain factors set forth by the Supreme Court. Id. (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509 (1947)).

The Piper Aircraft court listed the private and public interest factors that are to be considered by a district court in determining whether to dismiss a case on the ground of forum non conveniens. The private interest factors are: "'relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.'" Piper Aircraft, 454 U.S. at 241 n.6 (citing Gulf Oil, 330 U.S. at 508). The public interest factors are: "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary

problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. Piper Aircraft, 454 U.S. at 241 n.6 (quoting Gulf Oil, 330 U.S. at 509)). An analysis of these factors in this case leads the Court to conclude that dismissal would be inappropriate.

3. Private Interest Factors

Defendant is headquartered in the Eastern District of Pennsylvania and its records are stored there. Defendant argues that neither of these facts favors denying the Motion to Dismiss because defendant has already produced the records stored in Pennsylvania and has agreed to abide by any discovery orders issued by Bermudian courts. Moreover, defendant notes that Ardra's records are stored in Bermuda (although many Ardra records have already been produced in discovery).

With respect to witnesses, plaintiff took the position before Judge Sotomayor that plaintiff's most important witnesses were Richard and Jeanne DiLoreto who reside in Pennsylvania, as does Michael DiLoreto, their son, who was also involved in Ardra affairs. Plaintiff also claimed that Ardra's key witnesses, formerly of Bermuda, no longer reside there. As pointed out by plaintiff, Clive Himsworth, Ardra's Bermudian "manager" through 1983, presently resides in Vancouver, British Columbia; his successor until 1985, John Darwood, presently resides on Grand Cayman Island; and Ardra's Bermudian accountant through 1990, Ian Fleming, also resides in Vancouver. See Plaintiff's Memorandum in Opposition to Motion to Dismiss, filed November 30, 1994, at 7.

Defendant argues that the residence of the DiLoretos in Pennsylvania has no bearing on this issue because they have agreed to testify in Bermuda and Michael DiLoreto has already been deposed by plaintiff. On the other hand, defendant argues that it intends to call a large number of witnesses who reside in Bermuda. In response, plaintiff argues that defendant's list of witnesses is a mere laundry list that does not reflect those witnesses the defense will actually call at trial but, rather, is designed to persuade this Court to dismiss the case. Plaintiff also contends that defendant has greatly overstated the need for Bermudian witnesses in light of defendant's statement to Magistrate Judge Reuter that this is a "document case."

Neither party has raised any other arguments related to the private interest factors.[4] Thus, the private interest factors center on the location of records and witnesses. The location of the records of the relevant entities - Tiber and Ardra - is a neutral factor. The Court reaches that conclusion because some records of both such entities have already been produced and, with respect to the original records, Tiber's records are located in Pennsylvania, and Ardra's records are located in Bermuda. The location of witnesses factor presents a close question that

[4] Defendant argues that because many of the issues raised in this action are similar to those raised in plaintiff's Bermuda lawsuit against Ardra to enforce the New York judgment, it would be more convenient to consolidate the two cases than to try this case in this Court. However, the Bermuda trial court rendered its decision in that matter on May 16, 1997. Thus, trying the cases in a consolidated fashion is no longer possible and the Bermuda lawsuit is no longer a relevant consideration.

slightly favors dismissal in view of the number of Bermudian witnesses identified in defendant's submissions. However, because it is unclear exactly how many of the Bermudian witnesses defendant will actually call at trial, and in light of the fact that plaintiff's choice of forum has already been disturbed twice, the location of witnesses does not, without more, justify dismissal of the case. Accordingly, defendant's Motion to Dismiss will be denied unless the public interest factors justify granting the Motion.

4. Public Interest Factors

This Court must determine whether defendant acted in a fashion that should subject it to liability for the actions of Ardra. That is a question that primarily concerns Pennsylvania, New York, and Delaware, not Bermuda. That a number of the witnesses necessary to answer this question may be found in Bermuda does not change the fact that the issues in the case as to which any witnesses will testify concern those three states far more than Bermuda, particularly in light of the fact that Ardra was not licensed to sell insurance to Bermudian citizens or businesses.

New York undoubtedly has a strong interest in ensuring that corporations that reinsure those companies licensed to sell insurance to its citizens do not commit fraud or other illegal acts, as does Pennsylvania with respect to corporations headquartered in that state and Delaware with respect to corporations it charters (defendant is a Delaware corporation headquartered in Pennsylvania). Bermuda does have an interest in

the affairs of insurance companies that it incorporates. However, that interest is greatly diminished with respect to "exempt" companies such as Ardra, which are incorporated in Bermuda but are not allowed to sell insurance policies to its residents or businesses. Moreover, whether the corporate veil of such a corporation is pierced is relatively unimportant to Bermuda because defendant, not Ardra, will ultimately pay the price for Ardra's alleged bad acts if Ardra's corporate veil is pierced.

In addition, the jury's finding in this Court will determine whether defendant will be ordered to pay plaintiff a large sum of money that will be used to replenish the pool of funds provided by New York insurance companies to protect New York insurers, because that pool of funds was depleted by payments to Nassau's policy holders when it was liquidated. Plaintiff contends that the payments made by the fund would have been significantly reduced had Ardra fulfilled its reinsurance obligations to Nassau. In sum, the controversy before this Court is one that arose in the United States and centers around New York, and, to a lesser extent, Pennsylvania, and Delaware, not Bermuda. Thus, it is appropriate that the action be tried in a court located in one of those states.

Another factor favoring denial of the Motion to Dismiss is the conclusion of the Court, infra Part B.1.c., that New York law must be applied to plaintiff's veil-piercing claim. Thus, there is no merit in defendant's argument that the application of Bermuda law to this case supports dismissal.

Finally, the Court must consider that the parties have

stipulated to a jury trial of all issues. A jury drawn from the citizens of the Eastern District of Pennsylvania, in which defendant has its principal place of business, has a far greater interest in the affairs of defendant than does a Bermudian jury. Thus, it would be unfair to burden the citizens of Bermuda with jury duty in this case.

Under all of the circumstances of this case, it is clear that the public interest factors strongly favor denying defendant's Motion to Dismiss.[5]

5. The Motion to Dismiss Will Be Denied

Plaintiff's choice of forum has twice been disturbed. Although the private interest factors slightly favor the dismissal of this case, they do not warrant dismissal. More important, the public interest factors strongly favor denying the Motion to Dismiss, and are more than sufficient to outweigh the private

[5] Defendant cites a number of cases in support of its argument. The courts in each of those cases undertook a careful analysis of the Gulf Oil factors and determined that, under the facts of the cases before them, dismissal was appropriate. Although each of those cases involved some facts that are similar to those of this case, they also involved crucial facts supporting dismissal that distinguish them from the case at bar. For example, in Kempe v. Ocean Drilling & Exploration Co., 683 F. Supp. 1064 (E.D. La. 1988), aff'd 876 F.2d 1138 (5th Cir. 1989), some of the facts that the court concluded favored dismissal were 1) the plaintiffs were a Bermudian and an Englishman, representing a Bermuda corporation, 2) Bermuda's interest in the case had been specifically expressed by its government and "dwarfed" any interest held by Louisiana, and 3) Bermuda law would be applied to the veil-piercing question. See Kempe, 683 F. Supp. at 1070-72. None of those facts are present in the instant case. Each of the cases cited by defendant may be distinguished in a similar fashion. Thus, the Court concludes that none of the cases cited by defendant support dismissal.

interest factors. Accordingly, defendant's Motion to Dismiss the Amended Complaint Pursuant to Fed R.Civ.P. 12(b)(3) on the Ground of Forum Non Conveniens will be denied.[6]

B. Choice of Law

With respect to every issue discussed below except judicial estoppel, the parties agree that New York's choice of law rules apply to this case because the Southern District of New York was the transferor court. Van Dusen v. Barrack, 376 U.S. 612 (1964) (holding that the transferee court is to apply the choice of law rules that would have applied in the transferor court); Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) (articulating rule under which the Southern District of New York would have applied New York's choice of law rules). Which state's law applies to each cause of action is a question to be analyzed separately for each cause of action. Knieriemen v. Bache Halsey Stuart Shields Inc., 74 A.D.2d 290, 293, 427 N.Y.S.2d. 10, 13 (N.Y. App. Div.), app. dismissed 50 N.Y.2d 1021, 410 N.E.2d 745, 431 N.Y.S.2d 812 (N.Y.) and 51 N.Y.2d 970, 416 N.E.2d 1055, 435 N.Y.S.2d 720 (N.Y. 1980).

"The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict

[6] Because the Court concludes that the Motion to Dismiss should be denied, it need not reach plaintiff's argument that the law of the case doctrine bars a dismissal on the ground of forum non conveniens and the defendant's argument that no such bar exists because Judge Sotomayor's ruling on the first Motion to Dismiss on the ground of forum non conveniens was erroneous.

between the law of the jurisdictions involved." In re Allstate Ins. Co., 81 N.Y.2d 219, 227, 597 N.Y.S.2d 904, 908, 613 N.E.2d 936, 940 (1993), citing Miller v. Bombardier, Inc., 872 F. Supp. 114, 114; and Cooney v. Osgood Machinery, Inc., 81 N.Y.2d 66, 76, 595 N.Y.S.2d 919, 925, 612 N.E.2d 277, 283 (N.Y. 1993)). However, because the choice of law issues with which the Court is confronted require fact intensive inquiries, it is difficult, if not impossible, to determine whether there is, in fact, a difference in the laws of the jurisdictions under consideration - New York, Pennsylvania, Delaware, and Bermuda. Accordingly, because the parties must know which law will be applied in order to prepare the case for trial, the Court will forego an analysis of any differences in the law of the jurisdictions under consideration.

1. Veil-Piercing

a. Judicial Estoppel

Defendant argues that plaintiff is judicially estopped from contending any law other than that of Bermuda applies to the veil-piercing issue. That argument is based upon two prior statements made by plaintiff, one while this case was pending in the Southern District of New York, and one in the related state court litigation against the DiLoretos. Plaintiff argues that judicial estoppel does not apply to those statements for several reasons.

The parties do not agree as to which jurisdiction's choice of law rules should be applied to defendant's judicial estoppel argument. Defendant assumes that New York's choice of law rules apply; however, plaintiff argues that the Third Circuit has yet to

decide whether federal or state law governs issues of judicial estoppel in diversity cases. Plaintiff is correct on that point. The Third Circuit expressly left that question open in Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 n.2. (3d Cir. 1996). However, that question need not be answered in this case because, regardless of which jurisdiction's law of judicial estoppel is applied, plaintiff is not judicially estopped from arguing that the law of New York applies to his veil-piercing claim.

1) The Statements That Allegedly Give Rise to Judicial Estoppel

Defendant argues that two statements give rise to judicial estoppel in this case. First, in a May 1993 Memorandum of Law in Support of Motion to Dismiss Contract Defenses submitted in the New York state court action in which the DiLoretos are defendants, the Liquidator took the position that: "Ardra is a Bermudian reinsurer, and therefore Bermuda law governs whether the corporate veil should be pierced" ("1993 Statement"). Second, before this case was transferred from the Southern District of New York, plaintiff stated in the Memorandum of Law submitted in November 1994 in opposition to defendant's first Motion to Dismiss on the ground of forum non conveniens that: "The Court should have no difficulty applying Bermuda law to the piercing issue, if required. Bermudian law on this issue does not appear to vary significantly from New York Law." ("1994 Statement").

2) Judicial Estoppel in New York State Courts and the Second Circuit

Plaintiff argues that New York state courts and the Second Circuit apply the same judicial estoppel principles. To establish judicial estoppel in the Second Circuit: "First, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner." Bates v. Long Island Railroad Co., 997 F.2d 1028, 1038 (2d Cir. 1993). At least one New York state court has quoted Bates in explaining the judicial estoppel principles applicable in New York's state courts. In the Matter of 67 Vestry Tenants Ass'n V. Raab, 658 N.Y.S.2d 804, 1997 WL 191762, *3 (N.Y. Sup. Ct. Mar. 31, 1997). In the absence of authority to the contrary, the Court concludes that the basic judicial estoppel principles applied by New York state courts and the Second Circuit are the same.

In New York state courts, judicial estoppel only bars a party's change of position with respect to a fact, not a legal principle, because "[t]he submission of a legal argument is of a different character than an inconsistent framing of one's factual pleadings, and therefore not a basis for judicial estoppel." In re Arbitration between Excelsior 57th Corp. v. Kern, 218 A.D.2d 528, 529-30, 630 N.Y.S.2d 492, 494 (N.Y. App. Div. 1995) (citation and internal quotation marks omitted); see Ford Motor Credit Co. v. Colonial Funding Corp., 215 A.D.2d 435, 436, 626 N.Y.S.2d 527, 529 (N.Y. App. Div. 1995). The Second Circuit has taken the same position, stating that "[t]he doctrine of judicial estoppel prevents a party from asserting a factual position in a legal

proceeding that is contrary to a position previously taken by him in a prior legal proceeding." Bates, 997 F.2d at 1037 (emphasis added).

This Court concludes that plaintiff has taken inconsistent legal, not factual, positions in arguing that New York, rather than Bermuda, law applies to his veil-piercing claim. Thus, under the judicial estoppel principles applicable in New York state courts and the Second Circuit it is clear that plaintiff is not barred from changing his position on that issue.[7]

3) Judicial Estoppel in the Third Circuit

The Third Circuit has set forth a two-part inquiry that must be undertaken by a district court faced with a judicial estoppel argument. The district court must ask "(1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith -- i.e., 'with intent to play fast and loose' with the court?" McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996) (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)). Moreover, the Ryan Operations G.P. court stated that bad faith in this context requires an "inconsistent argument . . . attributable to intentional wrongdoing." Ryan Operations G.P., 81 F.3d at 362-363 (citations omitted). Therefore, judicial estoppel does not apply

[7] Because the Court reaches this conclusion, it need not reach plaintiff's alternative arguments as to why the judicial estoppel principles of New York and the Second Circuit do not bar his arguing that New York law applies to the veil-piercing claim.

"'when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court.'" Id. (quoting Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980)). Defendant has not shown bad faith.

Plaintiff's 1993 Statement was made in a footnote and raised an issue extraneous to the question before the state court at that time. The extraneous nature of the 1993 Statement is evidenced by the fact that the New York state court defendants took no position with respect to the statement and no other New York court has ever made reference to the statement. In fact, in affirming the trial court's ruling on the Liquidator's Motion to Dismiss Defendant's Breach of Contract Defenses in the New York state court action, the Appellate Division of the New York Supreme Court assumed New York veil-piercing law would apply. See Curiale v. Ardra Ins. Co. Ltd., 202 A.D.2d 252, 253, 608 N.Y.S.2d 464, 465 (N.Y.A.D. 1994). In light of the tangential nature of plaintiff's 1993 Statement and defendant's failure to present any evidence of intentional wrongdoing, the Court concludes that plaintiff's change in position was not made in bad faith. Thus, under Third Circuit law the 1993 Statement does not bar plaintiff's argument that New York law should be applied to his veil-piercing claim.

The 1994 Statement was clearly nothing more than an equivocation. The most important part of that statement reads as follows: "The Court should have no difficulty applying Bermuda law to the piercing issue, if required." (emphasis added). The qualification "if required" establishes that the 1994 Statement was

not an argument that Bermuda law applies to the veil-piercing issues; rather, that statement was made to support plaintiff's argument that, even if the application of Bermuda law was required, the Southern District of New York should have refused to dismiss the case on the ground of forum non conveniens. The 1994 Statement was clearly made for purposes of argument, and evidenced no intent on the part of plaintiff to assert that Bermuda law applies to his veil-piercing claim.

Moreover, defendant has not provided any evidence that establishes plaintiff acted in bad faith in changing his position as to which law should apply to the veil-piercing claim. In support of its argument, defendant relies primarily on the timing of the 1993 and 1994 Statements in relation to the plaintiff's current argument. Defendant argues that plaintiff's position evolved over time because he has come to believe that he is more likely to win his case if New York law applies to the veil-piercing question and that such evolution is evidence of bad faith. Moreover, argues defendant, plaintiff's failure to bring his earlier, contrary position to the attention of this Court evidences bad faith. Finally, defendant argues that plaintiff's failure in 1994 to take the position that New York law applies to the veil piercing claim supports the application of judicial estoppel at this time.

The timing issue raised by defendant is not evidence of intentional wrongdoing by plaintiff. Judicial estoppel issues only arise when one party changes its position on an issue before a

court. Mere change of position by a party, without more, is not evidence of bad faith. In the Third Circuit, in addition to change of position, a requirement of any claim of judicial estoppel, the party making that claim must establish bad faith by presenting evidence of intentional wrongdoing. Ryan Operations G.P., 81 F.3d at 361, 362-63. Although it would have been appropriate for plaintiff to bring to the Court's attention his change of position, his failure to do so is not sufficient to establish bad faith.

With respect to the 1994 Statement, defendant provides no authority in support of his position that plaintiff is judicially estopped from arguing that New York law applies because he did not make that argument in 1994. The 1994 Statement was an equivocation. Therefore, plaintiff took no position when he made that statement and the position he now takes cannot be contrary to the 1994 Statement. As a party's change of position is the threshold requirement of a judicial estoppel inquiry, and plaintiff's current position is not a change from his 1994 position, the 1994 Statement can not give rise to judicial estoppel concerns.

Accordingly, the Court concludes that, under Third Circuit law, plaintiff is not judicially estopped from arguing that New York law should apply to the veil-piercing claim. Thus, plaintiff may make that argument unless the law of the case doctrine requires the application of Bermuda law to the veil-piercing claim.

b. Law of the Case

Defendant argues that the law of the case doctrine requires the application of Bermuda law to the veil-piercing issue. The law of the case doctrine provides that an issue that has been decided will not be relitigated in the same case unless one of several exceptions applies. See, e.g., Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 165 (3d Cir. 1982) (citing 1B James Moore, Moore's Federal Practice ¶ 0.404[1] (2d ed. 1980)). In the context of a case that has been transferred, the doctrine means that "the successor [judge] should not ordinarily overrule the earlier decision [of the transferor judge]." Geibel v. United States, 667 F. Supp. 215, 219 (W.D. Pa. 1987) (citing Loumar, Inc. v. Smith, 698 F.2d 759 (5th Cir. 1983)), aff'd 845 F.2d 1011 (3d Cir. 1988) (table). There are four basic exceptions to the general rule: 1) a successor judge may consider a timely motion to reconsider where the predecessor judge is unavailable; 2) a successor judge may reconsider a previously decided issue if new evidence is available to the successor judge; 3) a successor judge may reconsider a previously decided issue if a supervening rule of law is valid and applicable to the issue; and 4) a successor judge may reconsider a previously decided issue if the decision was clearly erroneous and would work a manifest injustice. Schultz v. Onan Corp., 737 F.2d 339 (3d Cir. 1984) (citations omitted).

In contending that the law of the case bars plaintiff's argument that New York law applies to the veil-piercing question, defendant relies upon Judge Sotomayor's statement in her August 17, 1995 Memorandum opinion that "[n]either party disputes that

Bermudian law will govern whether the corporate veil may be pierced. Curiale v. Tiber Holding Corp., No. 94 Civ. 4770(SS), 1995 WL 479474, *4 (S.D.N.Y. Aug. 11, 1995). Judge Sotomayor cited plaintiff's Memorandum of Law in Opposition to the Motion to Dismiss as support for that statement. However, the only mention of the law applicable to the veil-piercing claim in that Memorandum of Law was that: "The Court should have no difficulty applying Bermuda law to the piercing issue, if required." (emphasis added).

Judge Sotomayor's conclusion that plaintiff's statement "did not dispute" the applicability of Bermuda's law to the veil-piercing claim was, in the judgment of this Court, clearly erroneous. The "if required" language of that statement clearly evidences the fact that plaintiff took no position on that question. Rather, plaintiff argued that even if Bermuda law did apply, dismissal of the case was inappropriate. Having concluded that Judge Sotomayor's conclusion was clearly erroneous, the Court must now consider whether a manifest injustice would result from refusing to reconsider her decision.

Since defendant raised the law of the case argument the Supreme Court of Bermuda (that country's trial court) has ruled that the 1994 New York state court judgment against Ardra was entered in violation of "natural justice" and thus may not be enforced against Ardra in Bermudian courts. Muhl v. Ardra Insurance Co. Ltd., 1995 No. 484, slip op. (Bermuda Sup. Ct. May 16, 1997). With the ruling by a Bermudian court that the 1994 judgment is not valid against Ardra, it is extremely unlikely that

any court in Bermuda would rule that the same judgment could serve as the basis for piercing Ardra's corporate veil and enforcing the judgment against Ardra's parent company, the defendant. Thus, plaintiff's veil-piercing claim would undoubtedly be unsuccessful if this Court were to conclude that it could not reconsider the question of which law applies to that claim. To allow such a result by adhering to a clearly erroneous ruling would work a manifest injustice. Therefore, the Court concludes that the law of the case doctrine does not bar plaintiff's argument that New York law should apply to his veil-piercing claim.

c. Choice of Law

Having considered the arguments of both parties, the Court, applying the choice of law rules of New York, concludes that New York law should apply to the veil-piercing question.

Only one New York state court decision appears to have addressed the question of how to determine what law applies to a veil-piercing claim. Defendants cite that case, Travelers Insurance Co. v. Chicago Bears Football Club, Inc., Index No. 900/92, slip op. (N.Y. Sup. Ct., Oct. 5, 1992), for the proposition that the law of the state of incorporation always governs in a veil-piercing case. However, the Travelers Insurance Co. court did not make a blanket statement in its ruling, writing that "upon the facts presented" the law of the state of defendant's incorporation, Bermuda, applied to the veil-piercing question. Travelers Insurance Co., slip op. at 8 (emphasis added). Thus, it is clear that Travelers Insurance Co. does not stand for the proposition

that all veil-piercing claims are governed by the law of the state in which the defendant corporation was incorporated.

In further support of its argument, defendant cites several Second Circuit and New York district court cases, a number of which were cited in Travelers Insurance Co., and all of which conclude that, pursuant to § 307 of the Restatement (Second) of Conflict of Laws, the law of the state of incorporation should apply to the veil-piercing question. See, e.g, Kalb, Voorhis & Co. v. American Financial Corp., 8 F.3d 130 (2d Cir. 1993); Soviet Pan Am Travel Effort v. Travel Committee, Inc., 756 F. Supp. 126 (S.D.N.Y. 1991). However, as explained by one Southern District of New York judge, "'[a]s a general matter, the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation. . . . Different conflicts principles, however, apply where the rights of third parties external to the corporation are at issue.'" Itel Containers Int'l Corp. v. Atlanttrafik Express Serv., Ltd., No. 86 Civ. 1313(RLC), 1988 WL 75262 (July 13, 1988 S.D.N.Y.) (quoting First Nat'l City Bank v. Banco Para El Comercio Exterior, 462 U.S. 611, 621 (1983) (emphasis in original) (citing Restatement (Second) of Conflict of Laws § 301).

The conflict of laws principles that apply when the rights of third parties that are external to the corporation are at issue "call for a weighing of contacts and governmental interests." Itel Containers at *4 (citation omitted). "Significantly more germane to this inquiry [then the fact of incorporation in a foreign country] are the points of contact with various nations of the

transactions by which defendant allegedly disregarded the corporate form of . . . [Ardra] to the detriment of third parties." Id. In this case, the transactions by which defendant allegedly disregarded Ardra's corporate form took place in New York, and New York law should therefore apply to the veil-piercing issue.

The cases defendant cites applied the law of the state of incorporation pursuant to § 307 of the Restatement (Second) of Conflicts of Laws. However, Section 307 cannot be read in a vacuum; rather, § 307 must be read in conjunction with § 306, which is titled "Liability of Majority Shareholder." And, "[c]ontrasting § 307 with § 306 . . . shows that the Restatement did not mean for § 307 to be applied in cases such as that present here." Foster v. Berwind Corp., Civ.A. No. 90-0857, 1991 WL 21666, *2 (E.D. Pa. Feb. 13, 1991). Section 306 provides:

> The obligations owed by a majority shareholder to the corporation and to the minority shareholders will be determined by the local law of the state of incorporation, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 [setting forth factors to be used in making a choice of law] to the parties and the corporation, in which even the local law of the other state will be applied. Restatement (Second) Conflict of Laws § 306.

The proper analysis of the choice of law issue under § 306 has been set forth by another member of this Court. That case involved a corporate structure identical to that at issue in this case, and was brought by Pennsylvania's Liquidator. Thus, the proper analysis may be derived simply by substituting the names of the parties to this lawsuit for the parties in that case, and

substituting New York for Pennsylvania, as follows:

> In this case, [Ardra] was a wholly-owned subsidiary of [Tiber]. [Ardra] was incorporated in Bermuda, but because of its status as an 'exempt' corporation, it was not entitled to do business in Bermuda. [Ardra's] business was conducted in the United States; its business with [Nassau Insurance Company] was conducted in [New York]. Although Bermuda regulates its reinsurance industry, that interest alone does not seem to outweigh [New York's] interest in investigating the claims of its domiciliaries against its own corporations.[8] Therefore, for the purpose of the piercing the corporate veil claim, [the Court] will apply [New York] law. Foster, 1991 WL 21666, at *2 (citation omitted and footnote number changed).

In sum, New York has a much stronger interest than Bermuda in the outcome of this case. Thus, New York law will be applied to the question of whether Ardra's corporate veil should be pierced.

2. Fraudulent Conveyance

a. Choice of Law

As with the choice of law issue related to the veil-piercing claim, the Court must apply the choice of law principles of New York in determining which law governs the fraudulent conveyance claim. Plaintiff argues that under such principles an interest analysis must be used to resolve tort-based choice of law questions such as the fraudulent conveyance claim and that under that test, New York law should be applied to that claim, citing Cooney v. Osgood Machinery, Inc., 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 922, 612 N.E.2d 277, 280 (N.Y. 1993). Defendant agrees that an interest test should be utilized and that the law of the jurisdiction having

[8] "It is important to note as well that [Tiber] is the defendant here, not [Ardra]. [Tiber] is a Pennsylvania corporation." Foster, 1991 WL 21666, at *2.

the greatest interest in the litigation should be applied to this claim. However, defendant argues that Bermuda, not New York, has the greatest interest in this aspect of the litigation.[9]

The details of the alleged fraudulent conveyances are summarized in plaintiff's Supplemental Submission on Choice of Law Issues. According to plaintiff's submission, virtually all of the relevant fraudulent conveyances were made by diverting funds from Ardra's New York bank accounts (either Ardra's account with Marine Midland Bank at 140 Broadway, New York, N.Y., or Ardra's account with National Bank of North America in New York). That fact and the analysis of the choice of law issue related to piercing of Ardra's corporate veil, lead the Court to conclude that New York has the most significant interest with respect to this claim. Thus, New York law will be applied to this claim.

3. Breach of Contract

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[9]The Court has previously stated that it will not determine whether there is an actual conflict between the law of the jurisdictions involved because of the nature of such an inquiry in this case. Having said that, the Court notes that there is a difference in the statutes of limitations applicable to the fraudulent conveyance claim under New York and Bermuda law. Under New York law, plaintiff's fraudulent conveyance claim must be brought within six (6) years of the date that the claim accrued or within two (2) years of the date the facts alerting plaintiff to the claim were discovered or with reasonable diligence could have been discovered, whichever period is longer. See N.Y.C.P.L.R. §§ 203 F, 213 (1)(8); See also Barrister's Abstract Corp. v. Caulfield, 203 A.D.2d 406, 610 N.Y.S.2d 555, 556 (2nd Dept. 1994); Orr v. Kinderhill Corp., 991 F.2d 31, 35 (2nd Cir. 1993). On the other hand, the applicable statute of limitations under Bermuda law is six (6) years from the dates of the alleged fraudulent conveyances. See Bermuda Conveyancing Amendment Act.

a. Choice of Law

Plaintiff's breach of contract claim is based on the December 1990 agreement between Tiber and Corporate Holding which obligated Tiber to maintain the capital and surplus account of Ardra at no less that $125,000 for five (5) years. That claim is made by plaintiff as receiver of certain Ardra assets on the ground that Ardra is a third-party beneficiary of the contract between defendant and Corporate Holding. Plaintiff contends that defendant breached that contract because no provision was made in Ardra's capital and surplus account for the 1994 judgment. Defendant argues that because the Supreme Court of Bermuda held that the New York state court judgment is not enforceable in Bermuda, plaintiff's breach of contract claim has no merit, regardless of what law is applied.

Plaintiff argues that on contract issues, New York choice of law rules dictate application of a "center of gravity" or "grouping of contacts" test to determine the substantive law to be applied, allowing for the consideration of "governmental interests" in an appropriate case. Allstate Ins. Co. v. Stolarz, 597 N.Y.S.2d 904, 906-07, 81 N.Y.2d 219, 225-26 (NY 1993). Applying that test plaintiff initially argued that the law of Delaware, the state of incorporation of both Tiber and Corporate Holding, ought to provide the rule of decision on the breach of contract claim. Defendant argued that Bermuda law should apply and that, if the Court disagreed, New York's choice of law principles favored the application of the law of Pennsylvania where the contract was

executed and Tiber maintains its headquarters, rather than the law of Delaware where Tiber and Corporate Holding were incorporated.

At a Status Conference conducted on May 12, 1997, because plaintiff's argument that Delaware law should be applied to the breach of contract claim was conclusory only, the Court directed plaintiff to file a supplemental memorandum elaborating upon his position. In that submission, plaintiff's Supplemental Submission on Choice of Laws Issues, plaintiff changed his position and now argues that New York law is applicable to the breach of contract claim. Defendant, in its supplemental submission, argues that either Bermuda law or Pennsylvania law governs that claim.

In analyzing the relevant contacts in this case, the Court considers the place of contracting, the places of negotiation and performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties, among other factors. See Brinks Ltd. v. South African Airways, 93 F.3d 1022, 1030-1031 (2nd Cir. 1996); see also In re Allstate Ins. Co., 81 N.Y.2d 219, 227, 597 N.Y.S.2d 904, 908, 613 N.E.2d 936, 940 (1993). The most important of such contacts are the places of contracting and performance. Brinks, 93 F.3d at 1030-31.

On the present state of the record the Court cannot decide the choice of law question with respect to the breach of contract claim. That conclusion is based on the fact that the record presented is incomplete and inconsistent. For example, defendant states that the contract was executed in Pennsylvania but there is no evidence of that in the record. Moreover, there is evidence

that the DiLoretos who executed the contract were domiciled in Pennsylvania but spent considerable time living in New York. There is no evidence of the place or places of negotiation. With respect to performance, the Court notes that notwithstanding the fact that Ardra is a Bermuda corporation, there is no evidence of the location of the account or accounts into which any payments made by defendant pursuant to the contract were to have been deposited, i.e., New York, Bermuda, or another jurisdiction. For these reasons, the Court will defer ruling on this choice of law issue until there is a record with respect to the place of contracting, the place or places of negotiation, the place of performance, and all other relevant factors.

III. CONCLUSION

For the reasons set forth above, defendant's Motion Pursuant to Fed. R. Civ. P. 12(b)(3) to Dismiss the Amended Complaint on the Ground of Forum Non Conveniens will be denied, New York law will be applied to plaintiff's veil-piercing and fraudulent conveyance claims, and the Court will defer its decision as to which law will be applied to plaintiff's breach of contract claim.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SALVATORE R. CURIALE, : CIVIL ACTION

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND HIS SUCCESSORS IN OFFICE AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NASSAU INSURANCE COMPANY :

:

vs.

:

TIBER HOLDING CORPORATION : **NO. 95-5284**

O R D E R

AND NOW, to wit, this 17th day of September, 1997, upon consideration of Defendant's Motion to Dismiss Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(3) on Ground of Forum Non Conveniens (Document No. 26, filed December 9, 1996), Plaintiff's Memorandum in Opposition to Defendant's Motion for Forum Non Conveniens Dismissal (Document No. 33), and Defendant's Reply Memorandum of Law in Further Support of its Motion (Document No. 34), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendant's Motion to Dismiss Amended Complaint

Pursuant to Federal Rule of Civil Procedure 12(b)(3) on Ground of Forum Non Conveniens, is **DENIED**.

Upon consideration of the numerous submissions of the parties with respect to the choice of law issues, **IT IS FURTHER ORDERED** that New York law will be applied to plaintiff's veil- piercing and fraudulent conveyance claims. The Court will defer its decision as to which law will be applied to plaintiff's breach of contract claims until the facts are more fully developed.

BY THE COURT:

JAN E. DUBOIS, J.